

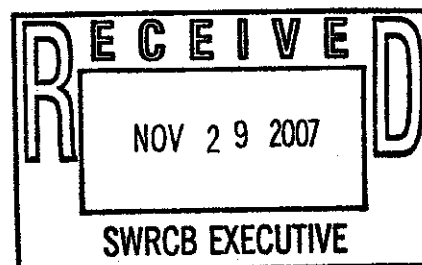


NATURAL RESOURCES DEFENSE COUNCIL

November 29, 2007

Via electronic mail and U.S. mail

Ms. Jeanine Townsend, Acting Clerk to the Board
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814



Re: Comments on Caltrans SWMP

Dear Ms. Townsend:

On behalf of the Natural Resources Defense Council (NRDC) and our more than 100,000 California members, we submit the following comments regarding the revised Storm Water Management Plan ("SWMP" or "draft Plan") proposed by the California Department of Transportation ("Caltrans"). Based on the State Water Resources Control Board's ("State Board") electronic notification, it is our understanding that the State Board intends to consider both the SWMP and the accompanying National Pollutant Discharge Elimination System Permit ("NPDES") at a future meeting in 2008.

As an initial matter, we find the approach of asking for public comment on a SWMP prior to the release of the Permit it would implement to be confusing and to "put the cart before the horse." For this reason, we believe the SWMP should be released in combination with a draft of the new (and overdue) statewide Permit to enable adequate public review. The SWMP is a document designed to attain compliance with the regulatory requirements in a permit, (40 C.F.R. Part 122.26), and it should go without saying that the current approach fails to disclose the applicable regulatory requirements and therefore prohibits any meaningful review of the SWMP. Without an additional comment opportunity, this approach to public review clearly violates public participation requirements, including those set forth in *Environmental Defense Center v. U.S. EPA*, 344 F.3d 832 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 2811 (2004).

This aside, we have reviewed the SWMP with an emphasis on provisions which would result in the installation of best management practices in new construction and in existing Caltrans facilities, including its freeways and roadways. We are disappointed by this iteration of the SWMP because it fails to ensure that Caltrans' operations meet the federally mandated maximum extent practicable ("MEP") standard or to contain a commitment to meet water quality standards. We recognize that the draft Plan attempts to resolve some of the shortfalls present in Caltrans' previous SWMP and expand the range of best management practices (BMPs) Caltrans employs. However, the draft

SWMP, like its predecessor SWMP, fails to adequately ensure that the MEP standard, or other measures required to assure compliance with water quality standards, will actually be implemented.

A chief problem is that the SWMP fails to articulate a sufficiently clear standard for MEP, stating only in vague, unenforceable terms that, "MEP is generally considered to be based on factors such as technical feasibility and related costs to achieve measurable environmental benefits." (Draft SWMP section 1 at 2). Rather than indicating the degree to which BMPs or other measures should be employed in order to attain the MEP standard, the draft Plan instead misapplies conventional standards¹ in order to provide justification for eliminating required action, and asserts: "MEP criteria such as economic, social, legal, or technological constraints may affect the feasibility and practicability of permanent BMPs. For example, some highway projects would necessitate extraordinary construction, plumbing, or features to collect and treat runoff." (Draft SWMP section 5 at 3.) The SWMP must give greater weight and discourse to the guiding principle behind the MEP standard—technical feasibility—and place less emphasis on cost and other factors as limitations to attaining the MEP standard.

In this connection, Caltrans has acknowledged that a large range of BMPs are both feasible and practicable for installation in highways, and these BMPs therefore should be installed. (Draft SWMP section 5 at 7.) However, the SWMP fails to clearly identify the situations in which BMPs will be installed, referring instead to the MEP standard as a limiting factor. This both ignores the duty of Caltrans to install BMPs to meet applicable water quality standards, irrespective of MEP, and fails to clearly set forth criteria to allow the State Board or the public to understand the scope of the obligations set forth in the SWMP.

This is not merely a speculative concern. Caltrans, unfortunately, has compiled a record of non-compliance with previous permits and court orders, specifically in the area of BMP installation in its facilities. As recently as July 2006, Caltrans has admitted to violations of court stipulations and orders regarding its storm water program. *NRDC v. van Loben Sels*, U.S. District Court, Central District of California, Case No. 93-6073-ER (JRx) (July 19, 2006 Stipulation and Order Re Dispute of March 30, 2006). Moreover, Caltrans failed to consider treatment and infiltration BMPs on numerous projects where there were acknowledged pollution control requirements. *Id.* These failures are precisely the type of problem that the draft SWMP should be

¹ See, e.g., State Water Resources Control Board, Order No. WQ 2000-11, at p. 20 (limiting the situations in which BMPs may not be required, and stating that "MEP requires permittees to choose effective BMPs, and to reject applicable BMPs *only* where other effective BMPs will serve the same purpose, the BMPs would not be technically feasible, or the cost would be prohibitive." (emphasis added)).

Ms. Jeanine Townsend, Acting Clerk to the Board

November 29, 2007

Page 3

designed to prevent, and precisely the type of problem that will be difficult to address under the draft SWMP as it is written. Given Caltrans' past performance, a more explicit and transparent set of benchmarks and directives should be delineated in the draft Plan.

As such, the draft Plan cannot be approved in its current form. Consideration of the draft Plan should be postponed until after release of the new statewide NPDES permit and after modification of the draft Plan such that it contains specific program elements that meet the requirements of the Permit and federal law.

Thank you for the opportunity to review and provide comments on the draft Program. Please feel free to contact us if you have any questions.

Sincerely,

A handwritten signature in dark ink, appearing to read "DSB", with a long horizontal flourish extending to the right.

David S. Beckman

Noah J. Garrison

Natural Resources Defense Council